IN THE SUPREME COURT
OF THE UNITED STATES

JOHN KENNY,

Petitioner,

vs.

LABAN MILES AND JOHN BIRD, Administrators of the Estate of Lah-tah-sah, deceased, Osage Allottee, No. 256,

Respondents.

No _____

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

The afore-named John Kenny, petitioner, prays for a writ of certiorari, requiring the Supreme Court of the State of Oklahoma to certify to the Supreme Court of the United States, for its review and determination, case numbered 7708 in said State Supreme Court, styled "John Kenny, Plaintiff in Error, vs. Laban Miles and John L. Bird, Administrators of the Estate of Lah-tah-sah, Osage Allottee No. 256, deceased, Defendants in Error."

To the Honorable The Supreme Court of the United States:

The petitioner, John Kenny, shows to this Honorable Court and alleges, that in an action pending in the District Court of the State of Oklahoma, numbered 7708, in which this petitioner was plaintiff in error, and the respondents herein were defendants in error, final judgement and decree was made and entered against this petitioner on the 30th day of January, 1917, denying him certain title, right, privileges and immunities claimed under the statutes of the United States and especially set up and claimed by him; and that said State Supreme Court is the highest court of the State in which a decision therein can be rendered. That said action involved the contest between the alleged heirs to the estate of deceased Osage Indian Allottee, named Lah-tah-sah. That the said Lah-tah-sah, the deceased, was a full-blood Osage Indian, who died in Osage County, Oklahoma, on or about August 19, 1908, where she had been allotted lands, but not having received a certificate of competency or having had her restrictions removed. She left surviving her, this petitioner, who is her son and who is also a full-blood Osage Indian, and an allottee and member of said Tribe of Indians in Oklahoma, who has not received a certificate of competency nor had his restrictions removed; and the respondent herein, Laban Miles, who was one of the defendants in error in said State Supreme Court, is a full-blood Osage Indian and allottee and member of said Tribe in Oklahoma, who has not received a certificate of competency nor had his restrictions removed, and who claims to have been married to Lah-tah-sah before her

death, and, as her surviving husband, an heir inheriting one-half of her estate.

This case had its inception in a probate proceeding in the County Court of Osage County, Oklahoma, by a petition for administration upon the estate of the deceased, signed by the said Laban Miles, asking the appointment of John L. Bird, the other respondent herein, as administrator, and, among other things, alleging:

> "The general character and probable value of the estate left by the deceased is as follows:
>
> Lands allotted to her, as a member of the Osage Tribe of Indians, in Osage County, Oklahoma, amounting to about 660 acres, of the approximate yearly rental value of $500, and Tribal Trust Funds belonging to her, as a member of said Tribe, and to her credit in the Treasury of the United States, together with oil, gas and other mineral annuities, of the approximate yearly income of $600."

Upon the appointment of such administrator, an appraisement was had and returned into that court, as authorized by the laws governing the procedure thereof, showing the real estate of the decedent to consist of the

> Northwest Quarter (NW¼) of Section 26, Township 24, Range 4, homestead; and the East Half (E½) of Section 30, Township 28, Range 9, containing 320 acres; Lot Three (3) East Half (E½) of the Southwest Quarter (SW¼) of Northwest Quarter (NW¼),Southeast Quarter (SE¼) of the Northwest Quarter (NW¼) of Section 4, Township 20, Range 10, containing 110.12 acres; North Half (N½) of Southeast Quarter (SE¼) of Section 4, Township 20, Range 10, containing 80 acres; all North and East of the Indian Meridian in Osage County, Oklahoma.

The allotment deeds were introduced in evidence, showing that the deed conveying homestead was executed by the principal chief, September 23, 1908, and the deed conveying the surplus land, on May 5, 1909. Petitioner

above set forth, on the 25th, 26th day of April, 1913, and on the 26th day of April the trial was adjourned to the 29th day of April, 1913, at noon, at which time said trial was resumed before said special judge, all parties being present in their own proper persons and by their attorneys, and continued on trial from noon of April 29th to May 2nd, inclusive, during which said time the plaintiff introduced his testimony and rested and the defendant introduced his testimony and rested, and thereup the plaintiff offered his testimony in rebuttal and rested. And the court, after examination of the pleadings and hearing the arguments of counsel in behalf of the respective parties, took the case under advisement pursuant to consent and agreement of counsel of the respective parties and stipulation of counsel for both parties filed in said cause; and

"Now on this 24th day of May, 1913, after due consideration of all the evidence and the arguments of counsel and being fully advised in the premises, the court finds the following facts:

"That in September, 1907, the plaintiff, Laban Miles, after having been divorced from his former wife, Wah-shah-she-me-tsa-he, according to Osage Indian custom, entered into an agreement with Lah-tah-sah, whereby he and Lah-tah-sah agreed to become man and wife. That both were full-blood members of the Osage Indian Tribe and unmarried at the time. That they thereupon assumed the marriage relation and continued to sustain that relation up to the time of Lah-tah-sah's death on August 19th, 1908, a period of eleven months. That the morning after they assumed such relationship, the defendant, John Kenny, the son of Lah-tah-sah, by a former husband, received a horse given away by Hlu-ah-wah-tah, the brother-in-law of the plaintiff, Laban Miles, in honor of the marriage of Laban Miles and Lah-tah-sah, in accordance with Osage Indian custom, which horse defendant sold, appropriating the money to his own use. That on said morning other presents were given in accordance with the custom of Osage Indians at the marriage of Indians of the age of Laban Miles and Lah-tah-sah, and who had been theretofore married. That a feast was given in honor of said marriage on the morning after Laban Miles brought Lah-tah-sah to his home, but neither Laban Miles nor Lah-tah-sah were at said feast. That Laban Miles

and Lah-tah-sah went to the Osage Indian Agent and had themselves enrolled as man and wife, and a trading card was issued to Laban Miles on his own and Lah-tah-sah's quarterly annuities and payments. That Laban Miles and Lah-tah-sah were recognized by the Indians with whom they associated as man and wife until Lah-tah-sah's death. They were also recognized during this time by the Osage Indian Agency and the Interior Department. That after assuming said relationship in September, 1907, they signed various papers to borrow money as man and wife, and held themselves out as such and were so recognized by those who dealt with them in a business way.

CONCLUSIONS OF LAW.

"That plaintiff, Laban Miles, and Lah-tah-sah, Osage Allottee No. 256, were husband and wife at the time of the death of the said Lah-tah-sah; that plaintiff, Laban Mailes, is the surviving husband of said Lah-tah-sah, and as such is the owner of an undivided one-half interest in and to the lands described in plaintiff's petition.

"The court further finds that Lah-tah-sah, Osage Allottee No. 256, died intestate on or about the 19th day of August, 1908, leaving an estate consisting in part of the lands described in plaintiff's petition.

"The court further finds that the plaintiff, Laban Miles, and defendant, John Kenny, above named, are the only heirs at law of said Lah-tah-sah, deceased, and, as such, plaintiff Laban Miles owns an undivided one-half interest, and the defendant John Kenny owns an undivided one-half interest in and to the lands allotted and deeded to said Lah-tah-sah, described in plaintiff's petition, to-wit:

NW¼ of Section 26, Township 24, Range 4;
NE¼ of Section 30, Township 28, Range 9;
SE¼ of Section 30, Township 28, Range 9;
Lot 3, E½ of SW¼ of NW¼, SE¼ of NW¼, N½ of SE¼ of Section 4, Township 20, Range 10, all North and East of the Indian Base and Meridian in Osage County, Oklahoma.

"The court further finds that no part of the lands described was ever used, occupied or claimed by said Lah-tah-sah, deceased, or any of the parties

to this action, as a homestead, and that no part of same was the homestead of said Lah-tah-sah, or of any of the parties to this action. The court further finds that the parties hereto have been unable to agree upon a partition or division of said lands.

"It is therefore ordered, adjudged and decreed by the court that the plaintiff, Laban Miles, and the defendant, John Kenny, are the owners in common of the lands described, and their respective interests and ownership therein is as follows:

"Laban Miles, plaintiff, Osage Allottee No. 507, an undivided one-half.

"John Kenny, defendant, Osage Allottee No. 2857, an undivided one-half, and that the shares of the aforesaid parties and their respective interests in the lands above described as above set forth, be and the same are hereby confirmed. It is further ordered, adjudged and decreed by the court that partition of said lands be made accordingly; that W. T. Mosier, J. W. Soderstrom and W. E. Savage are hereby appointed commissioners to make partition of said property among the parties according to their respective interests as herein fixed and determined, if such partition can be made without manifest injury. But if such partition cannot be made, the commissioners herein named shall make a valuation and appraisement of the property herein described and make a report of their proceedings to the court.

R. B. Boone, Special Judge."

The journal entry of judgment attached to such plea of *res adjudicata* showed that the deceased and Laban Miles were both full-blood Osage Indians, and described lands which the court judicially knew to be a part of the Osage tribal lands which had been distributed by allotments, and that the said Lah-tah-sah was an Osage allottee, and that said lands had been allotted and deeded to Lah-tah-sah, and contained the purported finding by the court that Lah-tah-sah died intestate on or about the 19th day of August, 1908, leaving an estate consisting in part

of lands, the description of which showed them to be the same lands as hereinbefore described; and such plea of *res adjudicata* failed to show that either of such Indians had received certificates of competency or had had their restrictions removed; or that the Honorable Secretary of the Interior had approved such partition judgment as required by Section 6 of the Act of Congress, approved April 18, 1912, 37 Stat. L. 86, providing:

> "That from and after the approval of this Act, the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction, in accordance with the laws of the State of Oklahoma; provided, that no partition or sale of the restricted land of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior."

There being no contention that the heirs had ever consented to such partition, but the pleadings in the case showing that the petitioner resisted such.

This judgment pleaded as *res adjudicata* had been rendered by the District Court of Osage County, Oklahoma, on the date and as shown by said exhibit attached to the plea of *res adjudicata,* in an action there pending, brought by the said Laban Miles against this petitioner, and while the said administration proceeding was pending in the County Court of said County and before the return to such County Court of the final report of the administrator and before such attempted distribution of said estate. To this plea of *res adjudicata,* the petitioner filed his demurrer, alleging:

> "First. The District Court of Osage County, Oklahoma, rendering the findings and judgment therein pleaded, was without jurisdiction to render a final binding judgment therein.

Third. Said plea does not state facts entitling the said Laban Miles to any right or relief, all as appear from said plea."

Upon the consideration of this demurrer, the County Court overruled the same, to which petitioner excepted. Thereupon, petitioner filed his answer to said plea of *res adjudicata*, alleging:

"Comes now John Kenny and answering the plea of *res adjudicata* filed herein by Laban Miles, denies each and every allegation therein contained, except such as are herein expressly admitted.

"(2) For further answer, this John Kenny denies that said Laban Miles was ever married to decedent, or became or is the husband or heir of decedent.

"(3) And further answering, John Kenny alleges:

"(a) That said previous administration was a nullity and of no effect, as the court was without jurisdiction, and the said Laban Miles, having petitioned for this administration, is estopped to plead any previuos administration.

"(b) That the district court rendering the judgment set up in said plea and referred to as the action between Laban Miles, plaintiff, adn John Kenny, defendant, was without jurisdiction to hear or determine the same or to render any judgment therein; that the lands therein described were the restricted lands and allotments of the decedent, and that the decedent was a full-blood Osage allottee who had not received a certificate of competency.

"(c) That said decedent, said Laban Miles, and said John Kenny are and were members of the Osage Tribe of Indians, of the full blood, residing in Osage County, Oklahoma, neither of whom have received a certificate of competency, and all of whom were and are incompetent Indians; and the Secretary of the Interior refused and failed to confirm or approve said judgment and proceedings of said district court, and the said is void and of no effect."

Thereupon, the said Laban Miles filed his motion to strike out the paragraphs of said answer, and the said

County Court, ruling thereon, struck out the second paragraph, to which petitioner excepted.

The said cause upon the remaining issues being tried in the County Court, and a decree and judgment being rendered against petitioner, the petitioner, within the time and in the manner authorized by the State Laws and Code of Procedure with respect thereto, appealed therefrom to the District Court of Osage County, Oklahoma, and demanded trial therein on both questions of law and fact. And in this manner the said action became one pending in the District Court of Osage County, Oklahoma, on appeal from the County Court of said County. Upon the consideration and judgment of said District Court, the said Court considered and overruled petitioner's demurrer to said plea of *res adjudicata*, to which petitioner excepted.

Thereupon, the said District Court, upon consideration of said Laban Miles' motion to strike, ordered and struck from the answer of petitioner, paragraphs 2, 3-a, 3-b and 3-c, to each and all of which rulings petitioner excepted.

And thereafter, the said cause being tried in said District Court upon the remaining issues in said case, said court, over the objection of petitioner, admitted in evidence the said judgment rendered in said partition action and attached to said plea of *res adjudicata* as above, to which ruling petitioner objected.

That the testimony, and all the testimony, in the trial of said cause showed that the petitioner, the said Laban Miles and the said Lah-tah-sah, deceased, were each and all full-blood Osage Indians, members of that Tribe in Oklahoma, and that neither of them had re-

ceived a certificate of competency or had their restrictions removed; that the said petitioner had not consented to the partition of said lands; and that the said partition judgment attached to said plea of *res adjudicata* and offered in evidence had not been approved by the Honorable Secretary of the Interior; that no actual partition or sale of any of said land had been made; and that none of the proceedings in said partition action had been approved by the Secretary of the Interior.

And said District Court, holding that said judgment in the partition action previously rendered was *res adjudicata* of the same issues in such proceeding in administration, denied the petitioner the several rights especially set up by him, and rendered judgment and decree against him and in favor of the said Laban Miles, decreeing that the said Laban Miles was an heir-at-law of said deceased, and was entitled to inherit one-half of her estate, and distributed one-half to him, to which petitioner objected. Thereupon the petitioner duly appealed to the Supreme Court of the State of Oklahoma, which action was therein numbered 7708 and styled "John Kenny, Plaintiff in Error, vs. Laban Miles and John L. Bird, Administrator of the Esate of Lah-tah-sah, Osage Allottee No. 256, deceased, Defendants in Error," that being the highest court of the State in which a judgment or decision in said case could be rendered. Petitioner denies that said Laban Miles was married to or is the husband and heir of said deceased, and was ready and stands ready to so prove.

Upon the due presentation of such appeal to said State Supreme Court, upon the opinion of one of its Com-

missions, authorized by the state laws so to act and to prepare opinions, which was approved by the said Supreme court, a copy of which opinion is contained in the transcript attached to the petition herein, said State Supreme Court, holding that said lands were selected in the right of Lah-tah-sah after her death, affirmed the judgment and decree of the District Court. The State Supreme Court considered the Act of Congress of June 28, 1906, the Osage Allotment Act, 34 Stat. L. 539, the Joint Resolution of Congress approved February 27, 1909, 35 Stat. L. 1167, the Act of Congress of March 3, 1909, 35 Stat. L. 778, and the Act of Congress of April 18, 1912, 37 Stat. L. 86, and held:

> "The Act of Congress of June 28, 1906, Chap. 572, 34 Stat. L. 539, placed no restrictions upon the alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage Tribe of Indians after his death, save only the mineral interests therein, reserved to the Tribe, individual disposition of which is expressly inhibited."

> "That the purpose of the Act of Congress of April 18, 1912, 34 Stat. L. 86, Chap. 83, was not to impose restrictions upon alienation of Osage lands, but to authorized the conveyance of said lands to which restrictions had attached by reason of their allotment to living members of the Tribe, who had subsequently died, leaving surviving them Indian heirs, members of the Tribe, to whom no certificates of competency were issued."

And, also:

> "That the District Court of Osage County had jurisdiction to partition the lands involved, and that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question."

Petitioner alleges that the said Lah-tah-sah, as a member of the Osage Tribe of Indians, was allotted said

tracts of land, and this petitioner inherited the same upon her decease, under and by virtue of the said Act of Congress of June 28, 1906, that the instant case, being a proceeding originating in the County Court of Osage County, Oklahoma, in the exercise of its probate jurisdiction, proceeded upon the theory that said lands were of the estate of the said Lah-tah-sah, deceased. The said Laban Miles, in the recitals of the petition filed by him for the appointment of the said administrator, recited that such lands had been allotted to the said Lah-tah-sah, as aforesaid. The return of the appraisers in said action showed that one tract thereof was designated as the homestead; and the purported judgment in partition pleaded as *res adjudicata* showed that Lah-tah-sah died intestate on or about the 19th day of August, 1908, leaving an estate consisting in part of the same lands; and the case was tried in the County and District Courts upon the theory that said lands were of the estate of the said Lah-tah-sah, deceased, and had been allotted to her; and there was no evidence that the lands had been selected or allotted after the death of the said Lah-tah-sah. However, the testimony showed that the allotment deeds had been executed and approved after her death. That such lands were subject to the restrictions imposed by the said Act of Congress of June 28, 1906, and of March 3, 1909, and were and are the restricted lands of a deceased Osage Indian allottee, within the meaning of the said Act of Congress of April 18, 1912, providing that the partition thereof shall be invalid until approved by the Secretary of the Interior.

A certified copy of the entire transcript of record of the case, including the proceeding in the Supreme Court

of the State of Oklahoma and the opinion and judgment of said court, marked "Exhibit A," is hereto attached, as an exhibit to this petition.

Your petitioner believes and alleges that said judgment and decress of the said Supreme Court of the State of Oklahoma in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination with the same power and authority and with like effect as if brought up by writ of error, as authorized by law, and as general reasons relied on for the allowance of said writ of certiorari, your petitioner alleges that the said State Supreme Court considered fully the federal questions involved and denied the petitioner the title, rights, privileges and immunities under such federal statutes especially set up and claimed by him:

(a) In affirming the judgment overruling petitioner's demurrer to such plea of *res adjudicata.*

(b) In affirming the judgment sustaining the ruling of the trial court, striking out the designated paragraphs of petitioner's answer.

(c) In affirming the judgment of the trial court admitting incompetent evidence offered by said Laban Miles with respect to such pleo of *res adjudicata.*

(d) In affirming the judgment of the trial court rejecting and excluding competent testimony offered by petitioner, that the said Laban Miles had not been married to and was not the husband or heir of the said decedent.

(e) In finding and holding that such lands had been selected in the right of the said Lah-tah-sah after her death; and in failing to find and hold that the said lands had been selected and allotted to the said Lah-tah-sah before her death, and that the said Laban Miles, because of the facts and admissions in the record and the theory of the proceeding, and

upon which the case was tried below, was estopped to deny that the said lands were the lands, and the restricted lands, of the said deceased Osage allottee.

(f) In failing to find and to hold that the said lands involved were the restricted lands of a deceased Osage allottee, and that the judgment and proceedings pleaded as *res adjudicata*, not having been approved by the Honorable Secretary of the Interior, were invalid, and not decisive of any of the issues involved in such administration proceeding, and not evidence of the truth of any of its purported findings or recitals.

(g) In holding that the Act of Congress of June 28, 1906, Chap. 572, Stat. L. 539, placed no restrictions upon the alienation by heirs to inherited lands allotted and deeded in the right of a member of the Osage Tribe of Indians after his death, save only the mineral interest therein, reserved to the Tribe, individual disposition of which is expressly inhibited. And the said State Supreme Court erred in failing to find and to hold that the said Act of Congress did place restrictions upon said lands and the Act of Congress of March 3, 1909, 35 Stat. L. 778, imposed restrictions on such lands and continued previous restrictions thereon; and in failing to find and to hold that the Osage tribal lands in Oklahoma, of which these allotments were parts, were subject to restriction and held by the Tribe, and that such restrictions, under the legislation for the division of such lands among the members of such Tribe, continued until certificates of competency were issued to the allottee, or the same was sold under the rules and regulations and subject to the approval of the Honorable Secretary of the Interior.

(h) And in finding and in holding that the purpose of the Act of Congress of April 18, 1912, 37 Stat. L. 86, Chap. 83, was not to impose restrictions upon alienation of Osage lands, but to authorize the conveyance of such of said lands to which restrictions had attached by reason of their allotment to living members of the Tribe, who have subsequently died, leaving surviving them Indian heirs, members of the Tribe, to whom certificates of competency were issued; and said Supreme Court erred in not holding that the purpose of said Act of Congress was to restrict the partition of lands of the character herein

involved subject to the approval of the Honorable Secretary of the Interior.

(i) And in holding that the District Court of Osage County had jurisdiction to partition the lands involved, that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question; and the said State Supreme Court erred in not holding that the said judgment of the District Court of Osage County, partitioning said lands, not being approved by the Honorable Secretary of the Interior, was invalid for any purpose whatever.

(j) In depriving petitioner of one-half of such trust funds and allotted lands by the use and means of such partition judgment, which was invalid and of no force for the purpose for which it was rendered.

(k) In giving force indirectly to such invalid judgment, when it was not enforceable directly.

(l) In depriving petitioner of the rights and privileges of the guardianship of the Government and the protection and supervision of the Honorable Secretary of the Interior with respect to such inherited Indian lands.

(m) In denying petitioner immunity from the operation and effect of said partition judgment until the same is approved by the Honorable Secretary of the Interior.

(n) In affirming the judgment of said District Court and denying petitioner a re-hearing therein and thereof.

That the said decision, judgment and decree of the State Supreme Court is final, and is the judgment and decree of the highest court of the State that can pass on the case, and this petitioner has no other remedy at law.

The petitioner has been denied the right to refute the issues which took from him one-half of this estate by a judgment not approved by the Secretary of the Interior and having no validity until it was so approved; and these rights, title, privileges and immunities taken from him, were given him under, and protected by, the said statutes of the United States. Notwithstanding the issues in-

volved were tried in said partition proceeding, yet, Congress, for reasons it considered sufficient, placed the Osage Indians of petitioner's class under the protection of the Secretary of the Interior; and, notwithstanding the findings and judgment for the partition of this land, the Honorable Secretary of the Interior has never seen fit to approve it; and if the result was so inequitable and unfair that the Secretary would not approve it, your petitioner submits that he should have had the right, in this administration proceeding, to a fair trial of these issues.

The said State Supreme Court, in the decision in this case, laid down rules of law necessarily affecting many like cases and much of the lands allotted to Osage Indians, and involving the rights of a great many of such Indians, and the issues herein not having been heretofore affirmatively decided by this Honorable Court, we submit that this case is one of that public interest and importance and that petitioner's contentions have that merit that the writ of certiorari should issue in this case.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, to the Supreme Court of the State of Oklahoma, requiring that the said cause, and the whole record thereof, be certified and removed to this court for review and determination, in the manner as provided by law and the rules of this court, to the end that the said case may be reviewed and determined by this Honorable Court with the same power and authority and with like effect as if brought up by writ of error, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appro-

priate and in conformity with law, and that the said judgment and decree of said Supreme Court of the State of Oklahoma in the said case, and every part thereof, may be reversed by this Honorable Court.

John Kenny
Petitioner.

By John Embry, Atty for petitioner
Elmer K. Hudson
Charles D. Fuller
Counsel for Petitioner.

State of Oklahoma, } ss.
Oklahoma County, }

John Embry, being duly sworn, says that he is one of the counsel for John Kenny, the petitioner; that he prepared the foregoing petition and that the allegations thereof are true, as he verily believes.

JOHN EMBRY.

Subscribed and sworn to before me by John Embry, this, the 12th day of April, A. D. 1917.

My commission expires Jan. 31, 1918.

(SEAL) J. I. TURNER, Notary Public,
Oklahoma County, Oklahoma.